Supreme Court, U
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No. 97-1157

In The

Supreme Court of the United States

October Term, 1997

JESUS RODRIGUEZ, MARIA RODRIGUEZ, JESUS REYES, YOLANDA REYES,

Petitioners,

vs.

ANTHONY SABATINO, SONJA SOSA, BORG WARNER PROTECTIVE SERVICES CORPORATION doing business as WELLS FARGO GUARD SERVICES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

The parent corporation of Respondent Borg-Warner Protective Services Corporation is Borg-Warner Security Corporation. There are no nonwholly owned subsidiaries of Respondent Borg-Warner Protective Services Corporation.

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STATEMENT OF THE CASE

This is a case involving fraudulent joinder.

This petition seeks the Court's review of the Fifth Circuit's opinion upholding the district court's finding that a non-diverse defendant security guard, Sonia Sosa, could not be found to be liable to the petitioners under Texas law. There is simply no cause for this Court's review of the Fifth Circuit's evaluation of Texas statutory and case law. The Fifth Circuit correctly stated the test for evaluating claims of fraudulent joinder and correctly placed the burden of proof on the respondents. No conflict among the circuits exists or is even alleged. Despite petitioner's exaggerated description of "the federal monolith . . . gobbling up powers reserved to the states," (Pet. 12), at most, petitioners are unhappy with the Fifth Circuit's application of a properly stated rule of law, which should not be grounds for review by this Honorable Court. Rule 10, Rules of the Supreme Court of the United States.

A. The Petition Misrepresents the Facts which were before the District Court and the Fifth Circuit.

The petitioners devote most of their petition to sifting through the Fifth Circuit's opinion, in an attempt to find minor inconsistencies in the record. In doing so, however, the petitioners missed the big picture by failing to note that all the *critical* facts were undisputed and in respondent's favor.

A brief review of the underlying facts is in order.

The case arises from a one vehicle accident which occurred at approximatley 4:24 a.m. on December 13, 1992 in Houston, Harris County, Texas. Maria Reyes and Jorge Rodriguez were two of the passengers that were killed in this accident. (R. 66-73).

There is no dispute that on December 12, 1992, Maria Reyes and Jorge Rodriguez were in attendance at a quincenera[1] hosted by Maria and Mario Mora at the Magnolia Civic Center, a property owned by the City of Houston. At least two City of Houston employees were on site during the course of the event. Rec. 43-44, 46-47. Although the Moras told the City of Houston that there would be 150 people in attendance, more than 250 people were in actual attendance. Rec. 43-47. The quincenera lasted from 8:00 p.m. until approximately midnight, at which time the Magnolia Center was locked and closed. Rec. 43-44, 52-54. A single Wells Fargo security guard, Sonia Sosa, was at the facility on the night in question, pursuant to a contract between Wells Fargo and the City of Houston. Rec. 52-54. Her job duties were to patrol the outer foyers, hallways, and parking lots of the building. Rec. 43-44, 46-47, 52-54, 260-261. Her job did not include checking identification of anyone consuming alcohol at the party, monitoring the service of alcohol at the party, or serving alcohol at the party. Rec. 43-44, 46-47, 52-54. It is undisputed that beer was served at the party, however, it is also undisputed that it was provided, controlled, and made available by the hosts of the party, Mario and Maria Mora, and not by the security guard. Rec. 40-41, 43-44, 46-47, 52-54, 223-228.

The accident occurred at approximately 4:24 a.m. on December 13, 1992, which was hours after the quincenera ended. Rec. 66-73.

An investigation of the incident was conducted by Arthur Valdez, a special agent with the Texas Alcoholic Beverage Commission. Rec. 40-41. Valdez concluded that the security officer did not sell, serve, or provide any alcoholic beverages to minors at the quincenera. Rec. 40. He did find that Mario

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1. A quincenera is a party given by parents in honor of their daughter's fifteenth birthday.

Mora, one of the hosts at the party, *did* provide alcohol to minors and Valdez cited Mora for a statutory violation of the Texas Alcoholic Beverage Code. Rec. 41. The City of Houston conducted its own investigation in this matter. Ultimately, Marta Moreno, the site manager for the City of Houston, wrote a letter of commendation to Wells Fargo, praising the work of the security guard in question. Rec. 256.

Although petitioners rely on purported conflicts in the record on minor points, they conveniently omit that all the critical liability facts were undisputed and in favor of respondents. These include:

1. It is undisputed that the security guard was not the owner of the premises in question. Rec. 43-44, 46-47. This is conceded by petitioner. (Pet. 4).

2. It is undisputed that the security guard was not a vendor or server of alcoholic beverages. Rec. 43-47.

3. It is further undisputed that the security guard did not actually sell, serve, or provide alcoholic beverages to anyone at the quincenera. Rec. 234-235, 260-261, 566-567, 569-570, 572-573, 575-577.

4. It is further undisputed that Wells Fargo had a contract with the City of Houston, and that Wells Fargo did not have any sort of contractual relationship with any of the persons attending the quincenera. In the record, plaintiffs have previously conceded this fact. Rec. 338, 449, 555. Also see Pet. 4.

Under these undisputed facts, the district court and the Fifth Circuit both concluded that Texas law would not find any legal duty owed by the security guard to the plaintiffs. Accordingly, the district court and Fifth Circuit agreed with defendant's

position that "there is no possibility of recovery from her by plaintiffs and *defendants have carried their burden* to establish fraudulent joinder which will defeat plaintiffs' motion to remand." Rec. 349. (Emphasis added).

B. Petitioners misrepresent clearly enunciated principles of Texas law which demonstrate that the underlying plaintiffs could not recovery against the security guard.

Under Texas law, the plaintiffs-petitioners do not have any possibility of recovery against the security guard.

The underlying plaintiffs raised what were essentially negligence based claims. The Texas Supreme Court has repeatedly stated that negligence causes of action require a showing that the defendant (here, the security guard) had a legal duty to the plaintiffs, that there was a breach of that legal duty, and that this breach proximately caused injury and damages to the plaintiffs. *El Chico Corp. v. Poole*, 732 S.W. 2d 306, 311 (Tex. 1987); *Rosas v. Buddy's Food Store*, 518 S.W. 2d 534, 536 (Tex. 1975). Both the district court and the Fifth Circuit properly determined that plaintiffs could not possibly recover from the security guard because, as a matter of law, Sonia Sosa owed no legal duty to the plaintiffs. Since no legal duty existed, there could be no possibility of recovery under Texas law.

The Texas Supreme Court has repeatedly stated that there is no duty to control the conduct of another, even if one has the practical ability to exercise such control, unless there exists a special relationship between the parties. *Graff v. Beard*, 858 S.W. 2d 918, 920 (Tex. 1993); *Greater Houston Transportation Company v. Phillips*, 801 S.W. 2d 523 (Tex. 1990); *Otis Engineering Corp. v. Clark*, 668 S.W. 2d 307, 309 (Tex. 1983). In this case, no such special relationship exists. The Texas Supreme Court has carved out narrow exceptions to this "well recognized no duty" doctrine, finding that a special relationship

exists where the plaintiff is an employee of the defendant employer, or where the defendant is a premises owner. It is absolutely undisputed that this sort of special relationship did not exist between the security guard and the plaintiffs. In effect, petitioners argue that although the security guard was not making alcohol available to minors, did not own the premises, and did not have any contractual relationship with plaintiffs, she was nonetheless under a duty to police more than two hundred (200) minors in attendance at the quincenera and, assumably, to prevent them from drinking after they left the quincenera. As the Fifth Circuit previously pointed out while interpreting Texas law, such an argument

> . . . presses the potential liability of law enforcement officers — *or of any group* — to the extreme to suggest that just by having contact with a potentially dangerous actor they become responsible in tort for his conduct.

Crider v. United States, 885 F.2d 294, 299 (5th Cir. 1989), emphasis added. Texas law is absolutely clear that the Wells Fargo security guard did not owe any legal duty to the plaintiffs in this matter.

Previously, the plaintiffs argued to the Fifth Circuit that Sonia Sosa should be found liable since she committed violations of the Texas Alcoholic Beverage Code. However, the relevant statutes, Sections 106.03(a) and 106.06 of the Texas Alcoholic Beverage Code, provide only that a person commits an offense if with criminal negligence he *sells* alcoholic beverages to a minor or if he purchases an alcoholic beverage for or gives or knowingly makes available an alcoholic beverage to a minor. It is undisputed that the security guard did not sell, purchase for, or knowingly make available alcohol to minors. Thus, there can be no liability on the part of the security guard for any sort of statutory violation.

The specific provisions of the Texas Alcoholic Beverage Code make it easy to distinguish the case most relied upon by petitioners, *Ryan v. Friesenhahn*, 911 S.W. 2d 113, 118 (Tex. App. — San Antonio 1995-writ granted). In *Ryan*, the defendants' teenage son held a party at his parent's home that was advertised as a "beer bust." In that case, the parents knew that minors would be consuming alcohol *at their home* during the party. Accordingly, the San Antonio Court of Appeals held that the plaintiffs' petition stated a cause of action for negligence per se for violations of the Texas Alcoholic Beverage Code. However, in *Ryan*, the defendant parents *were the owners of the property* where the party occurred. It was on these facts that the San Antonio court extended social host liability to defendants. In the matter before this court, the security guard was only employed as a contract security guard at the center where the event was being held. She was not the premises owner nor was she an employee of the premises owner. Furthermore, she did not supply, provide, serve, or make available the alcohol which was consumed at the event. The Fifth Circuit correctly found that she was not the equivalent of a social host and that *Ryan* was clearly distinguishable.

Finally, petitioners argue that the security guard should be liable under an "assumption of duty" theory. Petitioners argue that by observing a minor drinking and emptying his cup of beer, the security guard thereby voluntarily assumed the duty of monitoring the alcohol consumption of more than 250 guests at the quincenera. This argument is ludicrous and as such, was properly rejected by the district court and the Fifth Circuit.

The Fifth Circuit, properly placing the burden on the defendants to establish fraudulent joinder, properly found that under Texas law there was no possibility that existed for the petitioners to state a cause of action against the non-diverse security guard, Sonia Sosa. Petitioners strain to raise a colorable cause of action. However, each of these arguments were

previously weighed and rejected by both the district court and the Fifth Circuit. Texas law is very clear that a person is under no legal duty to control the conduct of another, even if there exists the practical ability to do so, unless a special relationship exists. *Graff v. Beard*, 858 S.W. 2d 918, 920 (Tex. 1993). The only "special relationships" which have been found by Texas courts in these sorts of cases arise from either the employer-employee relationship or from actual ownership of the premises where alcoholic beverages are served. The case before this Court does not fall within these narrow exceptions. Accordingly, the Fifth Circuit correctly applied the general Texas rule that the security guard owed no legal duty to the plaintiffs in this case.

REASONS FOR DENYING THE WRIT

This is a fact bound dispute involving the statutory and common law of the State of Texas. No federal question exists; no conflict among the circuits is even alleged. Both the trial court and the Court of Appeals correctly found that Respondents had sustained their burden by demonstrating that there was absolutely no possibility that Petitioners could recover from the non-diverse defendant under well established principles of Texas law. This dispute, involving interpretation of state law, does not warrant review by this Court.

1. The Court of Appeals correctly stated the legal standard governing fraudulent joinder cases. In fact, the Court of Appeals specifically cited the "no possibility" test relied upon by Petitioners. Petitioners do not allege that the Court of Appeals failed to state the proper rule of law relating to fraudulent joinder. Rather, Petitioners simply claim that the Fifth Circuit "misapplied the established standards." Pet., p. 10.[2]

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2. *See also* Pet. at page 11 (alleging the Fifth Circuit failed to give "proper application of these general standards . . .") Petitioners' (Cont'd)

Rule 10 of the Rules of the Supreme Court of the United States provides:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Yet, this is precisely what petitioners ask this Court to do. Petitioners' complaints simply do not rise to the level of "compelling reasons" required to invoke the certiorari jurisdiction of this Court.

2. Using the proper legal standard in fraudulent joinder cases, both courts below concluded that the respondents had sustained their burden of demonstrating that, under Texas law, there was no possibility that petitioners could state a claim against the non-diverse defendant. Petitioners complain that both the Texas based district court and the Fifth Circuit misinterpreted Texas law.

Petitioners' invitation to this Court to overrule the Fifth Circuit's interpretation of Texas law should be rejected. This Court traditionally accords great deference to the interpretation and application of state law by the courts of appeals.[3] This

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(Cont'd)
claim that the Fifth Circuit misapplied the properly stated law regarding fraudulent joinder does not provide the "compelling reasons" necessary to invoke the certiorari jurisdiction of this Court. Rules of the Supreme Court of the United States, Rule 10.

3. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 880, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986); *United States v. S. A. Empresa de Viacao Aerea*
(Cont'd)

doctrine has been described as a "settled and firm policy of deferring to regional courts of appeals in matters involving the construction of state law." *Bowen v. Massachusetts*, 487 U.S. 879, 908, 101 L. Ed. 2d 749, 108 S. Ct. 2722 (1988). This Court has indicated that it will uphold reasonable constructions of state law, *Oklahoma Tax Commission v Chickasaw Nation*, 515 U.S. 450, 490, 132 L. Ed. 2d 400, 115 S. Ct. 2214 (1995), and that it will defer to the findings of the courts of appeal on state law issues unless they amount to "plain error." *Palmer v. Hoffman*, 318 U.S. 109, 118, 87 L. Ed. 645, 63 S. Ct. 477 (1943). In fact, this Court has previously deferred to the Fifth Circuit on state law issues, specifically noting its special expertise in interpreting Texas law.[4]

Recently in *McMillen v. Monroe County*, 520 U.S. __, __, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997), this honorable Court paid special deference to the Court of Appeals' application of Alabama law, noting that two of the three judges on that Court of Appeals' panel were based in Alabama. It is significant to note that all three judges on the Fifth Circuit's panel in this case are based in Texas.[5]

(Cont'd)

Rio Grandense, 467 U.S. 815, n.12, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984); *Bishop v. Wood*, 426 U.S. 341, 345-347, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976).

4. *Dallas Independent School District v. Jett*, 491 U.S. 701, 738, 105 L. Ed. 2d 598, 109 S. Ct. 2702 (1989). *See also McMillian v. Monroe County*, 520 U.S. __, __, 138 L. Ed. 2d 1, 117 S. Ct. __ (1997).

5. Petitioners rely heavily on Judge Dennis' dissent to the Fifth Circuit's denial of Plaintiff's Writ for Mandamus. (Pet. 9-10). It should be noted that Judge Dennis is the only reviewing federal judge not based in Texas.

Under these circumstances, this Court should pay special deference to the Fifth Circuit's interpretation of Texas law in this matter.

CONCLUSION

Petitioners do not allege any conflict with other courts of appeals. Petitioners do not allege that the Fifth Circuit has misstated the proper legal test for fraudulent joinder. Rather, the petitioners simply allege that the Fifth Circuit has misapplied the properly stated standard and has misinterpreted Texas law. This type of state law based complaint does not give rise to the compelling reasons required to invoke the certiorari jurisdiction of this Court.

Four Texas based federal judges have already rejected petitioners' novel interpretation of Texas law. The Fifth Circuit's interpretation of Texas law is reasonable and should be accepted. Accordingly, the petition should be denied.

Respectfully submitted,

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